

The European Arrest Warrant: Part of the Anti-terrorism 'Emergency' Package?

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Anti-terrorism package

- JHA/European Council 20/21 September 2001
 - approval plan of action to combat terrorism
 - detailed road map (63 objectives) – multi-sector approach
- measures in JHA area
 - harness measures already adopted at EU level
 - speed up process of creating an area of freedom, security and justice = emergency measures
 - Europol, Eurojust, joint teams, freezing assets, extradition conventions + MLAT's, ...
 - re-establishment internal Schengen border checks
 - criminal law definition terrorism
 - European arrest warrant

European arrest warrant

- Commission proposal for framework decision tabled 19 September 2001
- aimed at replacing extradition with system of simple surrender on the basis of mutual recognition of 'European' arrest warrant
- likely political agreement/adoption JHA Council 6-7 December 2001
- considerable improvement since initial draft
- however: various remaining weaknesses
- to what extent anti-terrorism-triggered?
- overview draft 21 November 2001 (annex)

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Anti-terrorism-triggered?

- European arrest warrant necessary/proper anti-terrorism measure?
 - JHA acquis unsatisfactory? (gap analysis)
 - added value European arrest warrant?
 - relation 3rd states (global war against terrorism)
 - intra-EU
- if not
 - why so much presented that way
 - why pushed so hard

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JHA acquis unsatisfactory?

- traditional terrorism-related gaps in extradition law
 - political offence exception
 - refusal political(ly) (inspired) offence (e.g. political terrorism)
 - official rationale: neutrality, i.e. non-interference in internal political dynamics (establishment vs opposition) requesting state
 - unofficial message: extradition requested on political grounds
 - CoE 1977 Convention Suppression Terrorism
 - 1996 EU Extradition Convention
 - exception not be invoked for (criminal organisation or association to commit offences aimed at) terrorist offences
 - requirement of double criminality
 - abolished for terrorism in 1996 EU Extradition Convention
- already resolved in JHA acquis

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Added anti-terrorism value European arrest warrant?

- relation 3rd states
 - conflicting internal/external requests
 - initial draft: precedence European arrest warrant over extradition request 3rd non-CoE state (US)
 - text improved, but still: hesitation
 - no added value, on the contrary
- intra-EU: cut conceptual link asylum/extradition law
 - asylum: to be granted in case of likely prosecution on discriminatory (inter alia political) grounds
 - extradition: non-discrimination clause/exception

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Non-discrimination exception

- refusal due in case of likelihood of prosecution on discriminatory (inter alia political) grounds
- rationale
 - coherence with 1951 Geneva Convention (extradition as opposed to granting asylum or giving shelter)
- overview
 - Protocol to TEU on asylum for EU nationals
 - unilateral Belgian counter-declaration
 - 1999 Tampere European Council
 - Spanish bilateral initiatives
 - draft framework decision European arrest warrant

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- Protocol to TEU on ‘internal’ asylum
 - MS constitute ‘safe countries of origin’ per se
 - internal applications presumed manifestly unfounded
 - background: Belgo-Spanish ETA-case (Morena-Garcia)
- unilateral Belgian counter-declaration
 - ‘safe country of origin’ principle accepted
 - ‘manifestly unfounded’ principle rejected
 - continued individual examination of asylum request in line with Geneva Convention obligations
 - question: can MS agree to rule out individual state responsibility under Geneva Convention?

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- 1999 Tampere European Council

- future cornerstone of judicial co-operation: mutual recognition of judicial decisions (in criminal matters)
- November 2000 mutual recognition implementation plan
- ‘single legal area for extradition’
 - based on mutual recognition arrest warrants and sanctions involving deprivation of liberty
 - simple surrender instead of extradition procedure
 - Organised Crime ‘Millennium Strategy’ March 2000: only possible long-term option (2010)

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- Spanish bilateral initiatives

- several bilateral (pre-)treaties implementing a ‘surrender’ system and replacing extradition
- rather aggressive policy (anti-ETA-terrorism)
- aimed at gradual building up of support for a ‘closer co-operation’ (Articles 43-45 TEU) surrender framework
- to be tabled during Spanish Presidency
- 11 September WTC attack
 - global call for war against terrorism
 - speedened up EU decision-making process

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- European arrest warrant
 - political offence exception generally abolished
 - not only for terrorism (as in 1996 EU extradition Convention)
 - non-discrimination exception formally abolished
 - initial reference (pre-amble) to provisions EU Charter of Fundamental Rights relating to non-discrimination and right to asylum removed
 - only safeguard: temporary suspension European arrest warrant system possible in case of serious and persistent breach MS of fundamental human rights
 - insufficient
 - reintroduction non-discrimination exception?
 - unacceptable to inter alia Spain
 - infringing upon individual MS responsibility Geneva Convention
 - quid enlargement & human rights issues

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Unprecedented pressure & speed

- notwithstanding absence of apparent added value for combating terrorism
 - satisfactory JHA acquis
 - radical abolishment essential safeguards against discriminatory prosecution and internal human rights infringements in European arrest warrant undue, inopportune and infringing upon Geneva Convention
- explanation
 - political message prevailing over proper policy-making
 - anti-terrorism 'climate' unexpected opportunity for 'forcing' introduction new concept?

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Forcing vs respect basic treaties & democracy

- choice of the instrument problematic
 - framework decision only to be used for approximation (substantive) criminal law
 - not for establishing new international framework
 - entire convention-based extradition acquis to be declared non-applicable by ministerial decision?
 - convention required
 - general trend to avoid recourse to conventions
 - freedom, security & justice reinforced when EU doesn't see the point in observing fundamental rules democratic decision-making?

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Overview draft 21 November 2001

- scope of application
 - threshold for surrender: maximum of at least 12/4 months in 'issuing' MS
 - abolishment double criminality for about 30 offences
 - illogical rationale: punishable throughout EU
 - why then approximation EU 'core crimes'
 - possibility Council to add offences to list + optional refusal
 - European arrest warrant also applicable on offences not-listed in case of double criminality: extradition completely abolished
 - back in history: enumeration instead of seriousness offences
 - mutual recognition plan: only for most serious offences Article 29 TEU
 - = preferred, only logical option ('EU core crimes concept')
 - Luxembourg proposal: core crimes + serious offences (4 years)

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- grounds for refusal
 - reduced in number
 - new exception based on privileges/immunity?
 - mandatory + optional
 - own nationals/residents
 - ‘surrender for purpose execution sentence’ or enforce principle
 - surrender for purpose prosecution may be subjected to guaranty of re-surrender in view of serving sentence
 - initial Commission proposal improved
 - reintroduction specialty principle
 - ne bis in idem protection reinforced

- surrender = matter between judicial authorities
 - no ministerial intervention required any more
 - transmission/reception requests through central authority(ies) possible if organisation administration of justice requires so
 - most direct means of transmission allowed
 - only trace ‘in writing’ required
 - including SIS notice
 - having legal effect European arrest warrant
 - two-in-one-effect: abolition 2 stages (provisional arrest + extradition)

- deadline for decision on request
 - 10 days in case of consent person concerned
 - 60 days in other cases = very long
 - ministry not involved anymore
 - virtually nothing left to decide
 - potential added value precisely in reduction deadline
- deadline for surrender
 - 10 days

Conclusion: Emergency ... breaks the law?

- proclaimed enhanced security at the expense of freedom and justice?
- no apparent added value for combating terrorism compared to JHA acquis
- absence proper gap analysis
- radical abolishment essential safeguards against discriminatory prosecution and internal human rights infringements
- overall added value limited
- lack of respect for fundamentals TEU & HR Charter
- 'Festina lente'